Supreme Court, U.S.
FILED
MAY 19 1997
CLERK

(2)

No. 96-1473

In the Supreme Court of the United States

OCTOBER TERM, 1996

OPHEL H. ZEVALKINK AND ELEANOR M. HESSE,
PETITIONERS

v.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DAVID M. COHEN
JAMES M. KINSELLA
MIGUEL A. SERRANO
ANDREA I. KELLY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

10 pp

QUESTIONS PRESENTED

1. Whether, when a veteran dies while his or her disability claim is pending on appeal, the veteran's spouse must present any derivative claim for "accrued benefits" under 38 U.S.C. 5121 in a new action filed with the Department of Veterans Affairs.

2. Whether, when pursuing such a derivative action, the veteran's spouse is properly deemed, for purposes of issue preclusion, to stand in the same procedural position as the veteran at the time of the latter's death.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Landicho v. *Brown*, 7 Vet. App. 42 (1994)	5, 6, 8, 9, 12
Roy v. *Jasper Corp.*, 666 F.2d 714 (1st Cir. 1981)	11
Russell v. *Principi*, 3 Vet. App. 310 (1992)	4
Terrell v. *DeConna*, 877 F.2d 1267 (5th Cir. 1989)	11
Warth v. *Seldin*, 422 U.S. 490 (1975)	8

Statutes, regulation and rule:

Veterans' Benefits Improvements Act, Pub. L. No. 104-275, Tit. V, § 507, 110 Stat. 3343	3
Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105	2
38 U.S.C. 5108	2, 4, 7, 10, 11
38 U.S.C. 5112(b)(1)	5
38 U.S.C. 5121	3, 5, 7, 8, 9, 10, 11, 12
38 U.S.C. 7104(b)	2, 4, 7, 10
38 U.S.C. 7105(c)	4
38 U.S.C. 7266(a)	6, 8
38 U.S.C. 1110	2
38 U.S.C. 1131	2
38 C.F.R. 3.105(a)	2, 11
Court of Veterans Appeals R. Civ. P. 43(a) (38 U.S.C. App. at 730 (Supp. V. 1993))	5

Miscellaneous:

Restatement (Second) of Judgments (1982)	11

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1473

OPHEL H. ZEVALKINK AND ELEANOR M. HESSE,
PETITIONERS

v.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 102 F.3d 1236.[1]

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1996. The petition for a writ of certiorari was filed on March 17, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The panel consisted of Chief Judge Archer and Judges Rich and Michel. Judge Rich's name is inadvertently omitted at Pet. App. 1a, but appears at 102 F.3d 1236.

STATEMENT

1. A veteran may file a claim for benefits with the Department of Veterans Affairs (Department or VA) for a "disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service." 38 U.S.C. 1110, 1131. The veteran must first present the claim to a regional office or other division of the Department; if the claim is denied, the veteran may then appeal to the Board of Veterans' Appeals (Board), which is also within the Department.

Until 1988, veterans generally had no right to judicial review of final Board decisions denying their disability claims. In the Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105, however, Congress created the Court of Veterans Appeals (CVA) specifically to review such decisions. If denied relief in the CVA, a veteran may then, in certain circumstances, seek further review in the United States Court of Appeals for the Federal Circuit and, ultimately, this Court. As a general matter, once the denial of a claim becomes final, "the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered," 38 U.S.C. 7104(b), unless the claimant identifies "new and material evidence" to support the claim, 38 U.S.C. 5108. See also 38 C.F.R. 3.105(a) (authorizing revision of administrative decisions based on "clear and unmistakable error").

Upon a veteran's death, certain close family members—and specifically the veteran's spouse, if still living—may file a derivative claim for the veteran's

"accrued benefits" under 38 U.S.C. 5121. Neither Section 5121 nor any other provision of law, however, entitles a veteran's spouse to all benefits to which the veteran would have been entitled had he or she continued living. Instead, it entitles an "accrued benefits" claimant only to "periodic monetary benefits * * * to which [the veteran] was entitled at death under existing ratings or decisions, or those based on evidence in the file at the date of death * * * and due and unpaid for a period not to exceed two years." *Ibid.*[2]

2. a. James B. Zevalkink served on active duty in the United States Army from 1943 to 1945. In the decades following his separation from the Army, Mr. Zevalkink filed a number of unsuccessful disability claims, alleging that his service during the Second World War had led to certain medical disorders, including kidney disease. See Pet. App. 19a-21a. Mr. Zevalkink died on December 7, 1988. Shortly thereafter, his widow, petitioner Ophel Zevalkink, filed this claim under Section 5121 for accrued benefits based on, inter alia, the same kidney disorder that Mr. Zevalkink had repeatedly alleged in his own disability claims. After lengthy administrative proceedings before the VA's regional office, the Board ultimately denied that portion of petitioner Zevalkink's accrued-benefits claim on the ground that there was no "new and material evidence" to justify reopening the Board's earlier, and procedurally final, disposition of

---

[2] Section 5121 was amended in 1996 by the Veterans' Benefits Improvements Act, Pub. L. No. 104-275, Tit. V, § 507, 110 Stat. 3343, which changed the "due and unpaid" period from one to two years.

the kidney-related allegations in 1985. Pet. App. 70a-71a; see generally 38 U.S.C. 5108, 7104(b).[3]

On appeal, the CVA affirmed. The CVA first rejected petitioner Zevalkink's argument that, because she herself had not been a party to the multiple proceedings addressing Mr. Zevalkink's own disability claims, it would "unfair" to bar her from relitigating the kidney-related allegations underlying those claims based on the *same* evidence upon which Mr. Zevalkink had unsuccessfully relied. The CVA reasoned that, in the absence of "new and material evidence," allowing a spouse to relitigate issues fully and finally adjudicated during a veteran's lifetime would ignore "the basically derivative nature" of an accrued-benefits claim and undermine the "finality/reopening provisions of * * * the VA claims adjudication process." Pet. App. 28a (citing *Russell* v. *Principi*, 3 Vet. App. 310, 312 (1992), and 38 U.S.C. 7104(b), 7105(c), and 5108). The CVA then affirmed the Board's determination that petitioner Zevalkink had in fact failed to identify "new and material evidence" of service-connected kidney disease. Pet. App. 32a-34a.

b. In 1976, Burt Hesse, another veteran of the Second World War, first applied for disability benefits for pulmonary disease that he attributed to his wartime service. The regional office and the Board denied that claim in 1977, and, during the ensuing 11 years, Mr. Hesse unsuccessfully sought to reopen his

---

[3] The Board also rejected on the merits the portions of petitioner Zevalkink's accrued-benefits claim that were based on her deceased husband's other alleged medical disorders. Pet. App. 71a-74a. That aspect of the Board's decision was affirmed by the CVA, see *id.* at 34a-35a, and is not presented for review in this petition.

claim at least eight times. In 1990, the Board issued its last decision denying Mr. Hesse's efforts to reopen his claim, and, while an appeal from that decision was pending in the CVA, Mr. Hesse died. Pursuant to Rule 43(a) of its Rules of Practice and Procedure (see 38 U.S.C. App. at 730 (Supp. V 1993)),[4] the CVA substituted petitioner Eleanor Hesse as the appellant in her deceased husband's appeal. In 1992, the CVA vacated the Board's decision and remanded for consideration of certain evidence that Mr. Hesse had earlier submitted in support of his claim. The Board reaffirmed its earlier decision on the ground that the authenticity of the evidence had not been proven, and petitioner Hesse again appealed to the CVA. Pet. App. 4a-5a.

Before the CVA addressed petitioner Hesse's appeal from that ruling, however, it decided *Landicho* v. *Brown*, 7 Vet. App. 42 (1994). In *Landicho*, relying in part on a portion of its earlier decision in petitioner Zevalkink's case (see Pet. App. 23a-24a), the CVA held that, when a veteran dies during the pendency of his or her appeal of a denial of disability benefits, the veteran's spouse may not be substituted as a party to the appeal, but must instead file an original action with the VA for accrued benefits under 38 U.S.C. 5121. The CVA reasoned that, under 38 U.S.C. 5112(b)(1), veterans' claims do not survive their deaths; that only Section 5121 authorizes surviving family members to derive benefits from a deceased veteran's claim; and

---

[4] That Rule provided, in relevant part, that "[i]f a party dies after a Notice of Appeal is filed or while a proceeding is pending in this Court, any person claiming entitlement to accrued benefits under [38 U.S.C. § 5121(a)], the personal representative of the deceased party's estate, or any other appropriate person may be substituted as a party."

that accrued-benefits claims are distinct from disability claims and must therefore be pursued in different proceedings. 7 Vet. App. at 47-48.

Finally, the CVA held that an accrued-benefits claimant is not "adversely affected" by, and therefore lacks standing to challenge, an adverse disability-benefits decision by the Board that is pending on appeal at the time of a veteran's death. 7 Vet. App. at 49 (citing 38 U.S.C. 7266(a)). The CVA reasoned that once an original accrued-benefits proceeding is initiated, the "claimant stands in the exact position vis-a-vis adjudication of the deceased veteran's underlying disability-compensation claim as did the veteran immediately prior to his or her death," 7 Vet. App. at 52, and that any Board decision pending on appeal at the time of a veteran's death is "rendered a nullity" for purposes of a subsequent accrued-benefits claim, *id.* at 53. As a result, an accrued-benefits claimant in those circumstances may present allegations already rejected in the non-final (and therefore "nulli[fied]") Board decision without thereby violating the "new and material evidence" standard. See *ibid.* The CVA specifically corrected any "misapprehen[sion]" that its earlier decision in petitioner Zevalkink's case suggested a contrary conclusion. *Ibid.*

Because the CVA's decisions in *Landicho* and petitioner Zevalkink's case were dispositive of petitioner Hesse's efforts to be substituted as the appellant in her deceased husband's disability-benefits case, the parties jointly asked the CVA to dismiss the appeal on the basis of those precedents and to permit an immediate appeal of that dismissal to the Federal Circuit. The CVA granted that joint request. Pet. App. 53a.

3. After consolidating the separate appeals of petitioners Zevalkink and Hesse, the court of appeals affirmed. It first rejected petitioners' contention that, even in the absence of "new and material evidence," an accrued-benefits claimant may relitigate issues finally decided against a deceased veteran as part of a full and fair adjudication of the latter's disability-benefits claim. Like the CVA, the court of appeals held (Pet. App. 10a-11a) that, because petitioners' claims for accrued benefits are derivative of the deceased veterans' disability claims, petitioners are as bound by the finality provisions of 38 U.S.C. 5108 and 7104(b) as the veterans themselves would have been if they were still living. The court then held that, consistently with the CVA's decision in *Landicho*, petitioner Hesse "is not 'adversely affected' by," and therefore lacks statutory authority to challenge, the CVA's requirement that she file an original action with the VA for accrued benefits rather than continue her deceased husband's appeal for disability benefits. Pet. App. 14a-15a.

ARGUMENT

1. Citing procedures employed under unrelated federal benefits statutes (see Pet. 9-11), petitioner Hesse asserts a right to be substituted for her deceased husband and to continue the proceedings that he originally initiated to recover disability benefits.[5] Because petitioner Hesse suffered no legally cognizable injury from the denial of such substitution, however, she lacks standing to contest it. See generally

---

[5] Because petitioner Zevalkink brought her Section 5121 claim by filing an original action in the VA, she does not allege a right to be substituted in any proceeding initiated by her husband and pending at the time of his death.

Warth v. *Seldin*, 422 U.S. 490, 498-499 (1975); see also 38 U.S.C. 7266(a) (party must be "adversely affected" by Board decision in order to appeal it to CVA).

In the "accrued benefits" provision of Section 5121, Congress prescribed the limited entitlement of a veteran's surviving spouse to a portion of the benefits to which the veteran was entitled at the time of his or her death: specifically, the amount "due and unpaid for a period not to exceed two years."[6] Petitioner Hesse does not appear to claim entitlement to benefits independently of Section 5121; in particular, she does not assert a substantive right to benefits greater than what Section 5121 provides to surviving spouses. See, *e.g.*, Pet. 3, 7, 11, 13-19; see also Pet. App. 6a n.4. Instead, she asserts a procedural right to have her Section 5121 claim adjudicated as a continuation of her deceased husband's disability proceedings rather than, as required by *Landicho* v. *Brown*, 7 Vet. App. 42 (1994), by bringing an original Section 5121 action in the VA after her husband's death.

The court of appeals held (Pet. App. 14a-15a), and petitioner Hesse does not dispute, that she lacks standing to challenge the administrative exhaustion requirement set forth in *Landicho* unless she can show that it has caused her some substantive injury. Petitioner Hesse does claim to have suffered such an injury. In particular, throughout the petition, she

---

[6] Thus, even if petitioners were correct that "the background rule under all federal benefits statutes is that claims survive the deaths of the claimant unless Congress' contrary intent is explicit" (Pet. 9), that rule would be irrelevant here: Congress could not have been more explicit in confining a surviving spouse's substantive entitlement, upon the death of a veteran, to the benefits described in Section 5121. As discussed in the text, petitioners do not appear to contend otherwise.

maintains that, if she is not substituted for her deceased husband in his disability-benefits appeal, she will be "precluded" or "collaterally estopped" in any original action under Section 5121 "from raising issues pending on Mr. Hesse's appeal before his death." Pet. 8; see also *id.* at i (question 2), 7, 13-19.

That assertion—which is both the jurisdictional premise of the first question presented in the petition and a factual premise of the second (see Pet. i)—is incorrect. As the CVA made clear in *Landicho*, any "nonfinal[]" administrative adjudication of a veteran's disability-benefits claim is "rendered without force or effect by his death—meaning that it then bec[omes] a nullity" for purposes of a spouse's subsequent claim for accrued benefits. 7 Vet. App. at 52; see p. 6, *supra*. Put another way, upon filing a timely, original claim for accrued benefits, a surviving spouse is no less free to pursue the issues that were pending on a deceased veteran's appeal than the veteran would have been if he or she had not died. See *Landicho*, 7 Vet. App. at 51-53. Nothing in the court of appeals' decision in this case is to the contrary. Accordingly, petitioner Hesse is not substantively harmed by, and therefore lacks standing to contest, the requirement that she file an original accrued-benefits action in the VA rather than appear as a substituted party in her deceased husband's appeal in the CVA.[7]

2. Petitioners also challenge the court of appeals' holding that, in the absence of "new and material evidence," an accrued-benefits claimant generally may not relitigate issues that were decided against the

---

[7] Petitioner Hesse does not contend, and the court of appeals did not hold, that her accrued-benefits claim would be barred as untimely. See Pet. App. 13a, 15a.

veteran as a necessary component of a *final* adjudication of the veteran's disability claim. In petitioners' view, because a surviving spouse was not a party to the veteran's prior disability-benefits proceedings, the spouse—unlike the veteran during his or her lifetime—should not be bound by the final resolution of any issues in those proceedings. That position is without merit.

A surviving spouse's accrued-benefits claim is derivative of a deceased veteran's disability claim in that the spouse's entitlement is based on the veteran's entitlement at the time of death. Petitioners contend that, in establishing a veteran's entitlement, surviving spouses should be able to do what the veterans themselves could not have done in pursuing their own claims: rely on previously considered evidence to reopen issues already finally decided against them. As the court of appeals suggested (see Pet. App. 9a-11a), however, it would be anomalous for an accrued-benefits claimant—whose substantive entitlement to benefits is derivative of a veteran's—to stand in a procedural position superior to that occupied by the veteran before his or her death. Nothing in the text of Section 5121 compels that result. Indeed, as the CVA observed (Pet. App. 28a-29a), petitioners' effort to avoid the "new and material evidence" requirement is inconsistent with the statute's finality provisions, which specify that the identification of such evidence is a precondition to filing a "claim based on the same factual basis" as a prior claim whose denial has become final. 38 U.S.C. 7104(b); see also 38 U.S.C. 5108.

Petitioners also contend that it would violate due process to require "new and material evidence" before a surviving spouse may reopen factual issues finally

decided against a deceased veteran. As a general rule, however, a party asserting a wholly derivative claim is bound by final decisions regarding the original claim on which the new claim is based. See, *e.g.*, *Terrell* v. *DeConna*, 877 F.2d 1267, 1271-1272 (5th Cir. 1989); *Roy* v. *Jasper Corp.*, 666 F.2d 714, 718 (1st Cir. 1981); see also Restatement (Second) of Judgments § 48(2) (1982). Application of that rule is particularly appropriate here. Unlike common-law principles of issue preclusion, this statutory scheme permits veterans and their surviving spouses to relitigate issues that *have* been decided against them if they either identify "new and material evidence" on those issues, 38 U.S.C. 5108, or, in certain circumstances, demonstrate that the previous decisions against them were the product of "clear and unmistakable" error, 38 C.F.R. 3.105(a). As this case illustrates, that scheme permits claimants and their surviving spouses to continue litigating their entitlement to benefits arising out of a single set of facts for many decades after the underlying medical disabilities were allegedly incurred. The statutory provisions at issue here, which operate to impose some finality on litigation under this exceptionally liberal procedural scheme, do not violate due process.

Finally, petitioners suggest (Pet. 14-15) that it would be unfair to hold them to the "new and material evidence" standard because Section 5121 permits consideration only of "evidence on file at date of death." See generally Pet. App. 11a ("we interpret [Section 5121] as permitting the new adjudication of a prior claim only if there is new and material evidence in the file which has not previously been considered"). As an initial matter, that argument is not properly pre-

sented here, because the petition identifies no "new *and* material evidence" that would have justified relief but for the requirement that the evidence appear in a veteran's file at the time of death. Cf. Pet. App. 33a. The evidence on which petitioner Hesse seeks to rely, for example, *was* in her husband's file when he died because, at that time, it was a subject of his pending appeal in the CVA. See p. 5, *supra*.

In any event, because a claim under Section 5121 is derivative of a veteran's own entitlement to benefits while he or she was still living, Congress acted reasonably in confining a surviving spouse's evidentiary basis for claiming "accrued benefits" to the evidence accumulated during the veteran's lifetime. Although that evidentiary rule may limit the opportunity of some spouses to reopen issues that have long since become final, that is only because Congress permissibly determined that, for all relevant purposes, "an accrued-benefits claimant stands in the exact position vis-a-vis adjudication of the deceased veteran's underlying disability-compensation claim as did the veteran immediately prior to his or her death." *Landicho*, 7 Vet. App. at 52.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DAVID M. COHEN
JAMES M. KINSELLA
MIGUEL A. SERRANO
ANDREA I. KELLY
Attorneys

MAY 1997